

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 97-241-C - ORDER NO. 98-490  
JUNE 29, 1998

IN RE: South Carolina Telephone Association,	)	ORDER RULING ON
	)	COMPLAINT AND
Complainants/Petitioners,	)	ESTABLISHING
	)	INVESTIGATION
	)	
vs.	)	
	)	
VoiceMagic, Inc.,	)	
	)	
Respondent.	)	
	)	
	)	

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**I. Introduction**

This matter comes before the Public Service Commission of South Carolina (the Commission) in the case of the South Carolina Telephone Association, (SCTA) Complainants/Petitioners, vs. VoiceMagic, Inc., (VoiceMagic or the Company) Respondent. SCTA alleged that VoiceMagic was bypassing toll networks by using various Local Exchange Carrier's (LEC's) Extended Area Service (EAS) networks and call forwarding or 3-way calling to carry long distance calls on local or EAS facilities at a discounted rate, e.g. 25 cents per "access," regardless of the length of the conversation. SCTA stated its belief that this type of service offering jeopardizes the integrity of EAS

networks, and is fraudulent and illegal in South Carolina. SCTA then requested, *inter alia*, that this Commission take appropriate action to prevent abuse of the local and EAS telecommunications networks of SCTA's member companies. After an Answer to the Complaint/Petition was filed, SCTA requested a hearing on this matter. Prior to the hearing, several procedural motions were filed by the various parties, and disposed of. A Motion to Dismiss filed by VoiceMagic was still pending, however, at the time of the hearing.

A hearing was held beginning on February 12, 1998 at 2:30 PM in the offices of the Commission, with the Honorable Guy Butler, Chairman, presiding. SCTA was represented by M. John Bowen, Jr., Esquire and Margaret M. Fox, Esquire. SCTA presented the direct testimony of M.E. Clement, Henri Etta Baskins, Gary A. Tilley, and James P. Wilder. Gary E. Walsh, Deputy Executive Director of the Commission, was subpoenaed to appear on behalf of SCTA. Rebuttal testimony was presented by Henri Etta Baskins, Mary Jean Dennis, and L.B. Spearman. The Respondent VoiceMagic was represented by Gary Pennington, Esquire. VoiceMagic presented the testimony of Henry H. Perritt, Jr., and Dave Swetnam. The Commission Staff (the Staff) was represented by F. David Butler, General Counsel. The Staff presented no witnesses.

Members of the public were heard at this hearing and at two additional night hearings.

## **II. Summary of the Testimony**

SCTA first presented the testimony of M.E. Clement. Clement testified that VoiceMagic provides service by using a combination of EAS and Area Calling Plans, along with certain calling features. EAS is service which has been ordered by this Commission between exchanges which have a high community of interest between them. The cost of providing the service is based on the cost of providing trunking, switching, etc. between the two exchanges. The cost of EAS facilities is spread among all subscribers of incumbent local telephone company service in the relevant exchanges. Clement noted that an Area Calling Plan (ACP) is an optional service that normally provides flat rate costs to a specific area for the subscriber. The calling scope of an ACP may be LATA-wide, or it may provide for calling within an area delineated by mileage or by a particular exchange or exchanges. According to Clement, by using this arrangement (combination of EAS and ACP) in combination with certain calling features, VoiceMagic is violating tariffs of the member companies which prohibit resale of the companies' service. Clement alleged that VoiceMagic is also misusing the service of the respective companies for improper and unintended purposes.

Clement further explained his belief that VoiceMagic was using Call Forwarding features to forward calls from one local calling area to another to avoid paying toll charges. Clement noted that VoiceMagic has locations throughout South Carolina. Each location is chosen so that it is within the local calling area or the extended local calling area of the forwarding location, but includes unique areas that are local from one location, but which would be toll from another. This arrangement, according to Clement,

allows calls to be passed from one location to another that would otherwise require a toll call without incurring a toll charge. To clarify, a call is terminated in a location that is outside the local calling area of the originating location, and therefore is a long distance call.

Clement gave the following example: A local call is originated in Pond Branch by the customer dialing a VoiceMagic number in Lexington. Pond Branch has EAS to Lexington. The Lexington VoiceMagic number is call forwarded to a VoiceMagic number in Columbia. Lexington has EAS to Columbia. The VoiceMagic equipment in Columbia answers the call and asks the end user to enter a VoiceMagic authorization code. The call is then processed to the called party in Hampton, South Carolina, using BellSouth's LATAwide Area Calling Plan.

Clement again emphasized his opinion that VoiceMagic is using the Call Forwarding features as an arrangement to transfer calls originating from one local calling area to another local calling area for the express purpose of avoiding payment of toll charges between the station originating the call and the station terminating the call. Clement requests that this Commission find that this use of the various systems described is illegal and in violation of the rules of this Commission and the tariffs of the individual local exchange companies operating in South Carolina. SCTA also requests a cease and desist of all such operations, and of advertising for said service. SCTA also asks that we direct VoiceMagic to obtain an appropriate certificate from the Commission and that VoiceMagic should repay appropriate past toll and access charges owed to the various local exchange companies.

Henri Etta Baskins, Manager in Regulatory and Legislative Affairs for BellSouth Telecommunications, Inc. testified about VoiceMagic's activities in BellSouth territory. Baskins noted that VoiceMagic utilized a combination of a number of BellSouth local exchange services to provide toll service to the general public. These services consist of local exchange lines with a hunting/rollover feature, Prestige Communications Service and an Area Calling Plan or extended area service to adjoining local calling areas. Baskins stated that VoiceMagic provides certain residential non-published numbers to its customers through literature. Baskins opined that VoiceMagic was violating Section A2.2.1B of BellSouth's General Subscriber Services tariff, in that it was involved in resale of Basic Local Exchange Service to provide toll service. According to Baskins, if VoiceMagic wants to continue this service, it should be required to meet the necessary certification requirements and obtain the appropriate BellSouth services for resale.

Gary A. Tilley, Commercial Manager for West Carolina Rural Telephone Cooperative, Inc. (West Carolina) also testified. Tilley noted that in November of 1995, an individual called his office and subscribed to a fixed call forward feature in the Company's Due West exchange. In February of 1996, he called and requested fixed call forward numbers with rollover capabilities, such that when the first number was called and was busy, it would automatically roll over to the next remote call forward number. West Carolina informed the customer that it had no such service provisioned or tariffed. Upon investigation, West Carolina learned that the individual was employed by VoiceMagic. Further, West Carolina found that VoiceMagic was using EAS service to complete non-EAS calls across established EAS trunks.

Tilley noted that the VoiceMagic employee later requested three additional fixed call forward numbers from West Carolina. West Carolina granted this request while SCTA was pursuing a complaint against VoiceMagic with the Commission. Through further investigation, West Carolina states that it became aware of two residential customers in Due West that had installed a business line in their home with business call forward capability. The numbers were forwarded to VoiceMagic's Honea Path number. Such calls would come under EAS. Tilley noted that if toll charges were collected for calls completed by Voice Magic, toll payments would have been made to BellSouth totaling \$218,043 and West Carolina would have received \$35,913 of that amount in access charges.

Tilley testified that VoiceMagic's actions violate the law and West Carolina's tariff. Tilley noted that VoiceMagic is using the network to primarily complete calls between customers in areas where calls between the two customers would ordinarily be subject to toll charges, and that VoiceMagic is effectively reselling West Carolina's EAS service.

James P. Wilder, General Manager of Piedmont Rural Telephone Cooperative, Inc. (PRTC) testified before us. VoiceMagic ordered service from his Company for access lines in the Enoree and West End exchanges with special features of call forwarding and 3-way calling. Wilder examined customer switch records and found that the lines have a "transfer" function, which is not a tariffed PRTC service. The transfer function allows two parties to remain on a 3-way call, even after the original subscriber

had dropped off the line. Without this transfer function, the subscriber would ordinarily have to remain on the line for the other two parties to be able to continue the call.

According to Wilder, this transfer function allows VoiceMagic to set up a 3-way call and then immediately drop off the call, allowing the remaining two parties to talk to one another over EAS (local) networks, when a direct call between those two parties would ordinarily be a toll call. Wilder states that a similar scenario can be accomplished using the call forward feature. Wilder noted that certain PRTC numbers had heavy 3-way usage.

Wilder stated his opinion that the combination of the various features mentioned in his testimony gives the potential for VoiceMagic to process a huge volume of calls. Further, Wilder opined that VoiceMagic's service is a telecommunications service that connects live calls between customers that would ordinarily pay toll charges for those calls, using EAS networks and Area Calling Plans. Wilder believes that VoiceMagic's service violates the law and certain provisions of PRTC's tariff.

Gary E. Walsh, Deputy Executive Director of the Commission testified as to Commission Staff involvement in prior investigation of VoiceMagic. Walsh stated that although the Commission Staff became aware at a prior time that VoiceMagic had the capability of completing live calls through its "voice messaging" service, the Company evidenced its intent not to do so.

VoiceMagic presented the testimony of Henry H. Perritt, Jr., Dean and Professor of Law, Chicago-Kent College of Law, and Vice-President, Downtown Campus, Illinois Institute of Technology. Perritt expressed the opinion that VoiceMagic is an "enhanced

service provider,” and that, therefore, the service in controversy does not fall under the regulatory authority of this Commission. Perritt theorizes that VoiceMagic has simply carried Voice Messaging to the “next level,” which allows a caller to talk to another caller if the second caller is available. If the second caller is not available, the original caller may leave a message. According to Perritt, providing real time voice communication, coupled with store and forward voice messaging is “enhanced service” because it occurs under the active supervision of automated intelligence provided by VoiceMagic. Perritt stated his belief that the service in controversy meets the basic definition of “enhanced service,” i.e. an activity that involves processing of information rather than simply transmitting it unchanged, with the only control being exercised by the sender of the information. Perritt points out that here, the control is being exercised by VoiceMagic’s computer, much as a human operator in the old days used to supervise certain uses of telephone service.

Perritt further opined that VoiceMagic’s service meets the Federal Definition of “enhanced service.” The term is defined in 47 C.F.R. Section 64.702 as “services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.” Perritt theorizes that the involvement of underlying basic service does not deprive the enhanced service of its status as enhanced service. Perritt continued in his

testimony to attempt to demonstrate the ways in which VoiceMagic's service met the definition of "enhanced service." According to Perritt, if something more than a pure "pipe" is being offered, it is an "enhanced service." Perritt opined that the Telecommunications Act of 1996 preempts any regulation of VoiceMagic services by this Commission.

Dave Swetnam, Vice-President of Operations of VoiceMagic testified. Swetnam opined that his Company was an enhanced service provider, and that his service crosses state and LATA boundaries. Swetnam stated that his service as described has a recognized "niche," and that it would be unfair to declare the Company's "voice messaging" service unlawful. Swetnam testified that his service was somewhat like the "talking yellow pages," wherein a caller may be connected directly with a merchant who could possibly be in another LATA. Swetnam stated that his service does not allow a customer to place a toll call without incurring toll charges.

According to Swetnam, whenever representatives of the Company ordered any services from the LECs, it was always made clear to the sales representatives who were ordering the services the purpose for which the service was going to be offered. Swetnam also claimed that it consulted with the Commission Staff about the service, and had no negative response. Swetnam reiterated Perritt's testimony that an enhanced service provider such as his Company should not be regulated by this Commission.

Upon cross-examination, Swetnam revealed that he placed various orders for telephone lines under the guise of operating a "home business." Also, many of the lines

were installed in homes and areas where Swetnam did not actually live, and, indeed, where there was no housing. See discussion below.

Henri Etta Baskins testified in rebuttal to Swetnam's statement that no customer making a toll call over the VoiceMagic system avoids toll charges. Baskin followed four actual calls that were made with VoiceMagic's "Voice Messaging" service. These calls appeared to be calls that would normally incur toll charges, but did not, through the use of the VoiceMagic facilities. Baskins noted that besides using EAS and ACP services, with such features as call forwarding, VoiceMagic patches its way through the LECs' networks in an attempt to avoid toll and access charges. Baskins also noted on rebuttal that exchange service is carrying many times the traffic capacity for which it was designed and priced to handle.

Mary Jean Dennis of BellSouth offered testimony to rebut certain portions of the testimony of VoiceMagic witness Perritt. Dennis explained why specific aspects of VoiceMagic's service offering do not meet the Federal Communications Commission's (FCC's) definition of an enhanced service offering, and why this Commission is therefore authorized to exercise valid regulation over them as intrastate telecommunications services. Dennis notes that 47 C.F.R. Section 64.702(a) contains the following additional language defining enhanced services, which is language that did not appear in VoiceMagic witness Perritt's testimony. Enhanced services are "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional,

different, or restructured information; or involve subscriber interaction with stored information.”

Dennis notes that some of the functions provided through VoiceMagic’s service offering are appropriately considered enhanced services, but that that does not cause the whole range of functions available from VoiceMagic to be “enhanced.” Specifically, according to Dennis, the intraLATA toll service and call completion features are not enhanced services. The toll service is made possible by the impermissible use of a combination of local exchange services, not because of any enhanced service capability. Dennis opines that real time call completion, whether it be local exchange service or intraLATA toll service, is not enhanced service. It is a basic telecommunications service subject to the regulatory authority of this Commission. As such, it requires VoiceMagic to obtain proper telecommunications services provider certification from this Commission and also to comply with all applicable tariff requirements for the services it obtains from local exchange companies.

Ms. Dennis continues to rebut the testimony of Perritt, which states that the real time voice communication provided by VoiceMagic is an enhanced service because it occurs under the active supervision of automated intelligence. Ms. Dennis notes that VoiceMagic’s automated intelligence does not perform any functions that would fall into any of the classes in the FCC definition of enhanced services. VoiceMagic’s automated intelligence does not “act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information.” Transmitted information is the information intended for the called party; it is not the telephone number of the called party provided

to VoiceMagic, as claimed by Perritt on page 7 of his testimony. Further, according to Ms. Dennis, insofar as VoiceMagic relies on the FCC's rules regarding the definition of enhanced services, the FCC has clarified that its definition is not intended to apply to such things as "communications between a subscriber and the network itself for call setup, call routing, call cessation, calling or called party identification, billing and accounting. Computer III Phase II Order, 2 FCC Rcd 3072,3081 (1987). Second, the real time voice communication provided by VoiceMagic does not "provide the subscriber additional, different, or restructured information." Rather, in providing a real time voice communications service, VoiceMagic provides "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information, " i.e., a "basic" service." See Computer II Final Decision, 77 FCC 2d 384, 420 (1980). Third, according to Ms. Dennis, real time voice communication does not "involve subscriber interaction with stored information." Since no voice store and forward functionality is utilized, VoiceMagic's service is analogous to placing a telephone call with a credit card. In fact, Ms. Dennis states that Perritt's testimony on page 6 compares the control being exercised by VoiceMagic's computer as akin to the human operator who connected calls prior to the deployment of telephone company switching equipment. This further confirms that the "automated intelligence" in use by VoiceMagic during a real time voice communication does not convert the traditional basic service capability into an enhanced service.

Ms. Dennis also attempts to rebut Perritt's statement on page 8 of his testimony that the elements of the VoiceMagic service offering are inseparable and that so long as

the service offering includes an enhanced service component, then the entire service offering is an enhanced service. Ms. Dennis notes that VoiceMagic has chosen to bundle its service offering for marketing purposes, but that the voice messaging function can and does operate separately from the attempt to complete a real time voice communication. Storage and delivery are separable from the capability of placing an end-to-end voice call. Ms. Dennis notes that the business decision by VoiceMagic to bundle the service offerings and offer them at a combined price does not confer enhanced service status on services which are not enhanced. In addition, VoiceMagic must still comply with all state tariff requirements.

Further, Ms. Dennis disputes Perritt's statement on page 9 of his testimony that the very real possibility for these services to be used on an interstate basis limits the appropriateness of state policy different from Federal policy. Ms. Dennis believes that VoiceMagic has presented no evidence that either FCC rules or the pro-competitive policies of the Telecommunications Act of 1996 would conflict with the exercise of valid regulatory authority by this Commission over intrastate telecommunications service providers. Further, there is no evidence that the FCC has preempted the Commission from exercising jurisdiction over the intrastate component of the enhanced service portion of VoiceMagic's offering.

Finally, Ms. Dennis attempts to rebut Perritt's claim on page 10 of his testimony that section 253 of Title 47 of the U.S. Code, added by the Telecommunications Act of 1996, preempts any regulation of VoiceMagic Services by this Commission. This section is intended to remove all barriers to entry in the provision of telecommunications

services. Whereas Ms. Dennis believes that this section would prohibit this Commission from refusing to allow VoiceMagic to provide telecommunications services, no barrier to entry results from this Commission requiring VoiceMagic to comply with the provisions of the tariffed offerings it purchases from telecommunications carriers and to comply with state telecommunications certification requirements. Therefore, section 253, according to Ms. Dennis does not preempt this Commission's regulation of VoiceMagic's intrastate telecommunications services.

L.B. Spearman of Pond Branch Telephone Company (PBTC) presented rebuttal testimony to the direct testimony of Dave Swetnam. Swetnam had testified that it always made clear to LEC salespeople when VoiceMagic was ordering services, and the purposes for which the services were being ordered. Spearman testified in rebuttal to this and other Swetnam statements. According to Spearman, VoiceMagic itself has never subscribed to a PBTC line. Swetnam had subscribed to one line. A man named Steve Rogers subscribed to six lines, and told Spearman that he and other realtors would be using these lines. VoiceMagic is apparently using these lines to forward calls. Rogers works for VoiceMagic. On his original application for the lines, he stated that he was self-employed and that his wife worked part time. He did not list a place of employment for either him or his wife on the application for telephone service.

Spearman further testified that the manner of use of the lines by VoiceMagic is in violation of the PBTC tariffs.

### **III. Findings and Conclusions**

We have considered the testimony, the exhibits, and the entire record in this case, and we must find and conclude that VoiceMagic's bundled "message delivery service" is actually real time voice communication, with the opportunity to leave a message if, and only if, the line as dialed is busy, or there is no answer. We hold that the "message delivery service" is not an enhanced service as defined by the FCC. See testimony of Mary Jean Dennis. The main purpose of VoiceMagic's "message delivery service" is to complete live calls while avoiding toll charges. The message delivery portion of the service is secondary, and is severable from the basic telecommunications service provided by VoiceMagic, which is regulated by this Commission. VoiceMagic is capable of providing a true store and forward system that does not involve completion of end-to-end calls.

The testimony presented by SCTA clearly shows that VoiceMagic offers its "message delivery service" by circumventing the appropriate networks and by using the services of incumbent local exchange telephone companies in a manner both inconsistent and in conflict with the tariff provisions of the various company members of SCTA. VoiceMagic uses services like call forwarding and user transfer and conference features to link one local service area to another, thereby creating a "chain" that stretches across local service areas, avoiding toll charges that would otherwise apply.

The testimony shows that VoiceMagic is able to provide its service because of EAS routes, which have been ordered to be put in place by the Commission in order to allow local telephone customers to call other locations within their "community of

interest” without incurring a toll charge. The cost of EAS facilities is spread among the local telephone customers who are to benefit from the service. These EAS routes were not established for the purposes for which they are being used by VoiceMagic and the burden of additional traffic is being or will be unfairly borne by local telephone customers.

SCTA testimony shows that the VoiceMagic service violates individual local exchange company’s tariffs. We believe that this is also against public policy in that local telephone customers are having to pay for the increased long distance traffic being placed on local companies’ network without proper compensation.

Further, some of the “residences” claimed by VoiceMagic were not residences, but were empty mobile homes leased by VoiceMagic in which no one resides and leased lots without even a structure located on them, just a pedestal to hold the telecommunications equipment. We hold that VoiceMagic misused residential service, in particular, Area Calling Plan offerings using different “residences” and different individuals’ names. VoiceMagic’s claim that these were “home based businesses” must be rejected by the Commission in that in a number of cases, no one resides at the location, and in some places, there was not even a structure on the property.

We do note, however, that VoiceMagic’s service has a large number of customers who may be inconvenienced by an immediate cease and desist Order from this Commission. For this reason, VoiceMagic may continue to provide their bundled “message delivery service” under the following conditions:

- (1) VoiceMagic, within twenty (20) days of receipt of this Order, must apply to this Commission for appropriate certification;
- (2) VoiceMagic must not advertise its services or accept any new customers for this service pending certification;
- (3) Once certified, VoiceMagic must purchase appropriate tariffed services from certificated carriers;
- (4) VoiceMagic must refrain from improper and misleading advertising;
- (5) If VoiceMagic does not apply for a certificate within twenty (20) days from receipt of this Order, local exchange companies may exercise all rights and privileges provided for in the Commission's Rules and Regulations and the individual local exchange company tariffs;
- (6) If VoiceMagic applies for a Certificate within twenty (20) days, upon issuance of a Certificate from the Commission, then local exchange companies may exercise all rights and privileges provided for in the Commission's Rules and Regulations and by the local exchange company's individual tariffs;
- (7) VoiceMagic must, within twenty (20) days of receipt of this Order, notify all affected local exchange companies of any VoiceMagic service that is being subscribed to in a name other than VoiceMagic;
- (8) All future services ordered by VoiceMagic from local exchange companies shall be ordered in the name of VoiceMagic or any Commission-approved successor name;

(9) VoiceMagic must refrain from using call forwarding and user transfer and conference type features to link or “chain” local service areas, thereby avoiding appropriate toll charges;

(10) Within ten (10) days of the date of receipt of this Order, VoiceMagic shall begin sending notices prepared by the Commission to its customers informing them of the decision and the effect it will have on VoiceMagic customers;

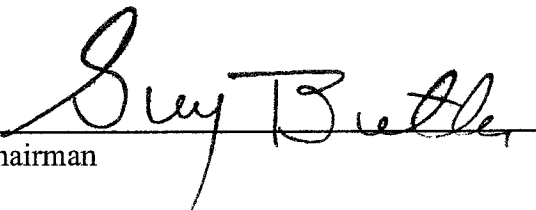
(11) Notification of all customers shall be completed within thirty (30) days after the Commission notices are sent to VoiceMagic;

(12) VoiceMagic’s Motion to Dismiss is denied. VoiceMagic’s service is a telecommunications service subject to regulation by this Commission, as per the discussion above.

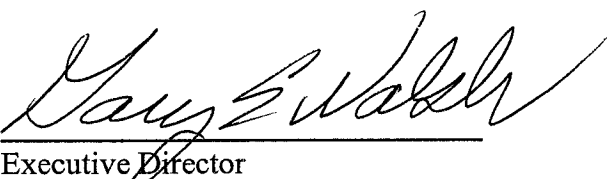
Additionally, we are concerned, however, about the “Talking Yellow Pages” feature available through LEC’s which was demonstrated during the course of the hearing. This feature appears to allow the avoidance of toll charges. We hereby establish an investigation into the ability of the “Talking Yellow Pages” to originate and terminate real time voice communications while avoiding toll charges that would otherwise apply. Staff shall undertake this investigation, and report its findings back to this Commission.

This Order shall remain in full force and effect until further Order of the  
Commission.

BY ORDER OF THE COMMISSION:

  
Chairman

ATTEST:

  
Acting Executive Director

(SEAL)